STATE OF MICHIGAN

COURT OF APPEALS

JAMES ROCKWELL and LAURIE ROCKWELL,

Plaintiffs-Appellants,

v

RAYTHEON CORPORATION, HUGHES AIRCRAFT COMPANY, and HUGHES INTERNATIONAL CORPORATION,

Defendants-Appellees.

UNPUBLISHED
February 9, 2006

No. 262723
Oakland Circuit Judge
LC No. 04-063245-CB

Before: Cavanagh, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

VATICO, Inc, also known as the Vietnam American Trade & Investment Consulting Company, and Hughes International Corporation ("Hughes") entered into a contract whereby VATICO was to serve as Hughes' nonexclusive sales representative for the sale of an air traffic control system to the country of Vietnam. Plaintiffs, who are assignees of VATICO's rights under the contract, claimed that Hughes breached the contract by failing to pay a commission on the ultimate sale of the air traffic control system. Plaintiffs appeal as of right from the trial court order granting summary disposition to defendants pursuant to MCR 2.116(C)(10). We reverse and remand.

VATICO and Hughes entered into their agreement on April 11, 1994, and periodically renewed it. Article IX.B of the agreement provided that "[e]ither party may terminate this agreement, in whole or in part, for its convenience upon thirty (30) days' written notice." Regarding commission upon such termination, Article IV.E of the agreement further provided:

> Commission shall be paid only with respect to contracts for AUTHORIZED PRODUCT entered into by HUGHES before expiration or termination for convenience of this agreement, or within ninety (90) days subsequent to the date of expiration or termination for convenience.

Article IX.A also allowed for termination of the agreement in the event of a substantial breach and stated that in such event, "no further commission payments, whether or not due and owing . . . shall be paid. . . ."

On April 8, 1998, Hughes sent VATICO a letter providing thirty days' notice of termination for convenience. It explained that it had merged with defendant Raytheon Corporation in December 1997, and that Raytheon had determined that the arrangement with VATICO exceeded its international marketing needs. On June 25, 1999, Raytheon and the Air Technical Traffic Services Center, acting on behalf of Vietnam Air Traffic Management ("Vietnam ATM"), executed a contract for a radar and flight data processing system. Although this contract was executed more than ninety days after the effective date of termination for convenience, plaintiffs asserted that they were entitled to a commission on this sale under various legal theories.

Plaintiffs first argue that the trial court erred in granting summary disposition because a question of fact existed regarding when defendants and Vietnam ATM entered into the contract. In support of its motion for summary disposition, defendants attached an affidavit by Paul B. Haseman, senior counsel for Raytheon, who averred that the contract was not entered into until June 25, 1999. Plaintiffs argue, in essence, that this is evidence of the formal contract but does not establish whether a contract was or was not actually formed at an earlier date. Plaintiff James Rockwell averred in an affidavit that Vietnam had decided to purchase the air traffic control system in 1996 and agreed to the essential terms at that time but simply had to obtain financing. However, because Rockwell did not elaborate on what terms were agreed to, it cannot be determined on the present record whether the terms were "essential" as a matter of law. His counsel represented at the motion hearing that the parties had agreed to product and price. It is not clear, however, that Rockwell could know the eventual price or terms, as the contract attached to Haseman's affidavit is redacted and does not include information regarding the product or services agreed to or the final price, and the trial court did not expressly speak to this factual issue.

As a preliminary matter, and although not directly addressed by the parties, we conclude that California law should apply to the analysis of the contract issues presented here because Article XII.B of the VATICO/Hughes contract specified that choice. In *Chrysler Corp v Skyline Industrial Services, Inc*, 448 Mich 113, 126; 528 NW2d 698 (1995), citing 1 Restatement of Conflict of Laws, 2d, § 187, p 561, the Michigan Supreme Court indicated that unless the chosen state has no substantial relationship to the parties or transaction, there was no reasonable basis for choosing that state, or the chosen state's law would be contrary to a fundamental policy of this state, the parties choice of law will govern if the issue is one the parties could have resolved by contractual provision. Here, Hughes' designated contact for the contract was S. J. Fitzgerald at Hughes International Corporation in Los Angeles, California. VATICO had offices in Hanoi, Washington, D.C., and Detroit, but in correspondence from VATICO's general counsel, Hughes was invited to contact the general counsel or James Rockwell (then managing director of VATICO in Vietnam) in Hanoi. The record indicates that Eric Rehmann, VATICO's managing director in the United States, was in VATICO's Washington, D.C. office. The complaint states generally that transactions giving rise to this complaint occurred in Vietnam and Michigan, but it is not clear what may have transpired in this state. Although VATICO has offices in the United States and Vietnam, Hughes' offices were in California at the time of contracting and VATICO's commitment under the contract called for work primarily in Vietnam. Thus, it appears that the most substantial United States contact at the time of contracting was with the state of California. The parties have not identified any policy concern with California law, and plaintiffs' entitlement to a commission under the circumstances could have been resolved by a contractual provision.

Chrysler Corp, *supra*. Consequently, we conclude that California law should apply to the contract issues presented here.

However, we find that Michigan law regarding summary disposition should also be applied. "A court usually applies its own local law rules prescribing how litigation shall be conducted even when it applies the local law rules of another state to resolve other issues in the case." Restatement, §122, p 350. However, in gray areas, such as burdens of proof and going forward with evidence, the court looks at whether the parties would have given thought to the issue when entering the contract, and whether the ultimate result will be affected. *Id*. at 351. Whether the issue has categorically been determined to be procedural or substantive is also considered, but the Restatement, *supra* at 351-352, cautions against attempting this categorization for purposes of deciding the issue. Here, it is unlikely that the parties entertained notions of which state would be more likely to find a genuine issue of material fact when they entered into the contract. Moreover, it appears California's approach to the question is similar to that of the courts of Michigan. See *Wiz Technology, Inc v Coopers & Lybrand, LLP*, 106 Cal App 4th 1, 10-11; 130 Cal Rptr 2d 263 (2003); California Code of Civil Procedure, § 437c. Accordingly, we find that Michigan's summary disposition rules control.

The general principles governing summary disposition were recently summarized in *In re Handelsman*, 266 Mich App 433, 435-436; 702 NW2d 641 (2005):

> A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a claim. The purpose of such a motion is to avoid extended discovery and an evidentiary hearing when a case can be quickly resolved as a matter of law. The moving party must specifically identify the undisputed factual issues, and support its position with affidavits, depositions, admissions, or documentary evidence. . . . If the moving party carries its initial burden, the party opposing the motion must then demonstrate with admissible evidence that a genuine and material issue of disputed fact exists, otherwise summary disposition is properly granted. We evaluate the trial court's decision on [defendants'] motion "by considering the substantively admissible evidence actually proffered in opposition to the motion. A reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial. A mere promise is insufficient under our court rules." [quoting *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999) (citations omitted).]

However, Michigan courts also recognize that, "[a]s a general rule, summary disposition is premature if granted before discovery on a disputed issue is complete." *Dep't of Social Services v Aetna Cas & Surety Co*, 177 Mich App 440, 446; 443 NW2d 420 (1989). Nevertheless, "summary disposition may be proper before discovery is complete where further discovery does not stand a fair chance of uncovering factual support for the position of the party opposing the motion." *Prysak v R L Polk Co*, 193 Mich App 1, 11; 483 NW2d 629 (1992).

In the present case, summary disposition was premature because plaintiffs' case should be permitted to go forward if they can support either of two claims: (1) that Hughes and Vietnam agreed to the essential terms of the contract in 1996; or (2) that Hughes and Vietnam or Vietnam ATM agreed to the essential terms within ninety days of the termination for convenience of the VATICO/Hughes' contract.

It cannot be said whether discovery will uncover support to show that an agreement predated execution of the formal contract[1] or that any agreement occurred within the allotted timeframe. However, all pertinent knowledge is in the hands of defendants and representatives of Vietnam. VATICO was not involved with the process after 1996 and, thus, even if essential terms were agreed upon in 1996, VATICO's representatives would not know whether the final contract reflected the initial essential terms or whether the fine-tuning in effect resulted in a rejection of any initial agreement and the formation of a new one. We note that if essential elements were left for future agreement, the contract would be fatally uncertain and unenforceable. *Horsemen's Benevolent & Protective Ass'n v Valley Racing Ass'n*, 4 Cal App 4th 1538, 1558; 6 Cal Rptr 2d 698 (1992). However, discovery is necessary to establish whether this is true. Moreover, assuming that the essential terms were not agreed upon in 1996, it is nonetheless probable that a meeting of the minds occurred before the actual date of execution of the contract. If discovery reveals that the essential terms were agreed to before the ninety-day period post-dating the termination of the VATICO/Hughes' contract, plaintiffs would be entitled to a commission. Although the trial court may have correctly deduced the unlikelihood of a June 1999 written contract reflecting an agreement formed before August 1998, discovery might uncover factual support to the contrary. Notably, Haseman's affidavit does not refute the prospect that an agreement was formed at an earlier date. Also, because he was not the signatory to the contract on behalf of Raytheon/Hughes and does not represent that he was directly involved in the negotiations, it is not clear that he could speak to these particulars. Given that there is no information regarding when Hughes and Vietnam reached a meeting of the minds on essential terms, but there is some indication that there may have been a meeting of the minds as early as 1996, discovery was warranted and summary disposition was premature. Moreover, whether or not Hughes undertook measures to delay formation of the contract until after a period when VATICO would have qualified for a commission will also come out in discovery.

We reject defendants' argument that a potential 1996 contract would be irrelevant for the reason that, if it existed, it did not comply with the statute of frauds. Whether a contract was formed for purposes of entitling plaintiffs to a commission is a different question from whether that same contract would be subject to challenge under the statute of frauds. The existence of a Vietnam/Hughes' contract, not its validity, is at issue. We also reject defendants' argument that any action based on the formation of a 1996 contract would be barred by the statute of limitations. The VATICO/Hughes' agreement called for the payment of a commission to VATICO upon receipt by Hughes of payment. A cause of action would not have arisen until Vietnam paid Hughes, as Hughes' duty to perform did not arise until such time.

---

[1] Plaintiffs assert that the Vietnamese concept of a contract differs substantially from the generally accepted American concept of a contract and that, under Cal Civ Code § 1646, the Vietnamese concept should control because Vietnam is the place of performance. Plaintiffs do not explain how a "contract" differs under Vietnamese law. However, § 1646 has been interpreted to be subservient to a choice of law provision in the parties' contract. See *Shippers Development Co v General Ins Co of America*, 274 Cal App 2d 661, 674; 79 Cal Rptr 388 (1969).

Plaintiffs also argue that they were entitled to a commission so long as the termination of the Hughes/VATICO contract was not for breach. Coextensively, they argue that the trial court should have considered the parties' correspondence during negotiation of the Hughes/VATICO contract, in addition to the contract itself, to construe the contract in this way. Plaintiffs cite to various provisions of the California Civil Code in support of their argument that the Court should look beyond the contract itself. Most notably, they cite Cal Civ Code §§ 1639 and 1640, which indicate that, although the parties' intent is preliminarily to be determined by the written contract, it can be further scrutinized to uncover the parties' true intentions, which plaintiffs assert requires evidence and hence, discovery. However, California law on construction of contracts was recently summarized in *People ex rel Lockyer v R J Reynolds Tobacco Co*, 107 Cal App 4th 516, 524-526; 132 Cal Rptr 2d 151 (2003). It clearly affirms the hornbook principle that with an unambiguous contract, intent is analyzed by reference to the clear and explicit language of the agreement where it does not lead to absurd results.

Here, Article IV.E of the VATICO/Hughes' agreement is not ambiguous. VATICO was terminated for convenience and, according to this term of the contract, it is entitled to a commission only if Hughes secured a contract before the termination by convenience or within ninety days. No other language in the contract and no other provision suggests an alternative result.

Plaintiff suggests that the term "any obligation of commission" is subject to divergent interpretations. But this is not a contract term; rather, it is a term in a letter pre-dating execution of the contract. If the Court could look to parol evidence to interpret the contract, this would be relevant to the parties' intent. However, in *Casa Herrera, Inc v Beydoun*, 32 Cal 4th 336; 9 Cal Rptr 3d 97 (2004), the California Supreme Court indicated that "'the introduction of any extrinsic evidence, whether oral or written, to vary, alter or add to the terms of an integrated written instrument'" is prohibited. *Id*. at 343, quoting *Alling v Universal Mfg Corp*, 5 Cal App 4th 1412, 1433; 7 Cal Rptr 2d 718 (1992). This agreement had an integration clause. The court in *Casa Hererra* also noted that the parol evidence rule does not prohibit the introduction of extrinsic evidence "'to explain the meaning of a written contract. . . [if] the meaning urged is one to which the written contract terms are reasonably susceptible.'" *Id*., quoting *BMW of North America, Inc v New Motor Vehicle Bd*, 162 Cal App 3d 908, 990 n 4; 209 Cal Rptr 50 (1984). The meaning of Article IV.E urged by plaintiff—that a commission would be payable for a contract entered into *after* the ninety-day period following termination for convenience—is inconsistent with the provision itself. Thus, the contract terms are not reasonably susceptible to this interpretation. The term plaintiff seeks to clarify is not a contract term, but a term in a letter predating this integrated contract; the parol evidence rule does not endorse resort to parol evidence for the very term that the party is seeking to establish by parol evidence.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra
/s/ Jane E. Markey